IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

WP(Crl.).No. 193 of 2007(S)

PETITIONER:

A.M.MOIDEEN, S/O.MARAKKAR,
AGED 60 YEARS, AMANATH HOUSE, KILLIMANGALAM,
VADAKKUNCHERRY-VIA, THRISSUR DISTRICT.

BY ADV. SRI.O.V.MANIPRASAD

RESPONDENTS:
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1. **STATE OF KERALA REPRESENTED BY**
   THE ADDITIONAL CHIEF SECRETARY TO GOVERNMENT,
   HOME AND VIGILANCE DEPARTMENT,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. **THE DISTRICT MAGISTRATE AND DISTRICT**
   COLLECTOR, THRISSUR.

3. **THE SUPERINTENDENT OF CENTRAL PRISON,**
   VIYYOOR, THRISSUR.

4. **THE SUB INSPECTOR OF POLICE,**
   CHERUTHURUTHY POLICE STATION, THRISSUR DISTRICT.

BYSPL.GOVERNMENT PLEADER SRI.K.K.RAVINDRANATH

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON 19/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

WPCR.NO.193/2007 S

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE ORDER OF DETENTION NO.32169/07 DTD. 19/06/2007 OF THE 2ND RESPONDENT.**

EXT.P2: **COPY OF THE GROUNDS OF DETENTION.**

EXT.P3: **COPY OF THE MEMO FOR EXECUTING THE ORDER OF DETENTION.**

EXT.P4: **COPY OF THE ORDER PASSED BY THE 1ST RESPONDENT DTD. 29/06/2007.**

EXT.P5: **COPY OF THE ORDER PASSED BY THE DTD. 16/07/2007 MODIFYING AND CORRECTING EXHIBIT P4.**

EXT.P6: **COPY OF THE JUDGMENT DTD. 17/06/2002 IN W.A.NO.1286/02 AND CONNECTED CASES.**

EXT.P7: **COPY OF THE REPRESENTATION DTD. 25/07/2007 BEFORE THE ADVISORY BOARD.**

EXT.P8: **COPY OF THE REPRESENTATION SUBMITTED BY THE DETENU TO THE GOVERNMENT ON 03/08/2007.**

EXT.P8(A): **COPY OF THE RECEIPT ISSUED BY THE COURIER SERVICE.**

EXT.P9: **COPY OF THE REPRESENTATION DTD. 03/07/2007 SUBMITTED BY THE PETITIONER ALONG WITH THE WIFE OF THE DETENU.**

EXT.P10: **COPY OF THE LETTER DTD. 24/07/2007 ISSUED ON BEHALF OF THE 1ST RESPONDENT.**

2ND RESPONDENT'S EXHIBIT:

EXT.R2(A): **COPY OF THE NOTICE WITH ACKNOWLEDGEMENT OF THE DETENU DTD. 20/06/2007.**

/TRUE COPY/

P.A.TO JUDGE

KSS

K.BALAKRISHNAN NAIR & T.R.RAMACHANDRAN NAIR, JJ.

Writ Petition (Crl) No.193 of 2007-S

Judgment

Balakrishnan Nair, J.

The petitioner is the father of Mr.A.M.Ummer, who has been detained under the provisions of the Kerala Anti Social Activities (Prevention) Ordinance 2007 (Ordinance No.30/07), by order dated 19.06.2007 of the second respondent District Magistrate. The brief facts of the case are the following :

2. The allegation against Mr.A.M.Ummer, who is hereinafter referred to as the detenu, is that he is indulging in illegal mining and transporting of river sand from Bharathapuzha river. In other words, he is a depradator of environment. So, the District Magistrate issued Ext.P1 detention order dated 19.06.2007 and in execution of that order, the detenu was arrested and he is suffering incarceration from the said date onwards. Ext.P2, which contains the grounds of detention, was also served on him, along with Ext.P1. Ext.P1 order of detention was confirmed by the Government by Ext.P4 order dated 29.06.2007. There was a mistake in the said order, in which, the petitioner was

described as a “Known Rowdi”, instead of “Known Goonda”. The said mistake was corrected by issuing Ext.P5 order dated 16.07.2007. The detenu filed Ext.P7 representation before the Advisory Board, constituted under the Act. He submitted that he knew about the consideration of his case by the Advisory Board, only when the said Board visited the prison to hear the detenu. The said representation was followed by Ext.P8 representation before the Government by the detenue and Ext.P9 representation by the petitioner and the wife of the detenu. The Government replied to Ext.P9 by Ext.P10, stating that the representation under the Ordinance No.30/2007 can be filed only by the detenu and not by his relatives. In the above background, this Writ Petition is filed, praying for the issuance of a writ of habeas corpus for the production of the detenu before this Court and to set him at liberty.

3. The petitioner attacks the detention of his son on various grounds. The following irregularities are pointed out against the detention order :-

1) The District Magistrate, as evident from the impugned order, acted on the report of the SI of Police and not on the report of the District Superintendent of Police. The District Superintendent only forwarded the report of the SI of Police

to the District Magistrate.

2) Several documents are seen relied on in the impugned order, the copies of which were not served on him.

3) The detention order as well as the grounds of detention was in English and therefore, he was disabled from filing an effective representation.

4) The Government should have passed the confirmation order within 10 days. In this case, the initial confirmation order Ext.P4 is a void order, as the Government proceeded on the footing that the detenu is a “Rowdi”. The second confirmation order was passed after the above said time limit. So, the confirmation was never validly made. There is total non-application of mind from the part of the Government in issuing the confirmation order.

4. Apart from the above procedural improprieties, it is also contented that the detenu has not been found guilty for the violation of Section 4(1A) of the Mines & Minerals (Development & Regulation) Act, 1957. So, his case is not covered by the first limb of Section 2(o) of Ordinance No.30/07, defining a “Known Goonda”. Therefore, the detention order suffers from this substantive invalidity also, it is submitted.

5. The respondents have filed a counter affidavit, dealing with the contentions of the petitioner in the Writ Petition. According to them, the detention order has been validly made. The SI of police only forwarded the report to the District Superintendent of Police, who, in turn, applied his mind and submitted a report in terms of the provisions of the Act before the District Magistrate, who relied upon it and passed the impugned order. Similarly, the other procedural improprieties pointed out by the petitioner are also met in the counter affidavit. Regarding the substantive challenge also, the respondents have given their explanation. According to them, the detenu pleaded guilty to the charges of violation of Section 4(1A) of the Mines and Mineral (Development and Regulation) Act, 1957. So, the detenu clearly comes under the definition of "Known Goonda" and therefore, the detention order is validly made. The respondents have also produced copies of Exts.P1 and P2, in which the detenu has made an endorsement to the effect that the order and the grounds of detention were read over and explained to him in Malayalam and that he understood them. Therefore, the respondents pray for dismissal of the Writ Petition.

6. We heard the learned counsel Shri.O.V.Maniprasad, for the petitioner and the learned Special Government Pleader and Laison Officer Shri.K.K.Ravindranath, on behalf of the respondents. Before going into the procedural improprieties in the proceedings of the second respondent, we would first consider the substantive ground raised by the writ petitioner that the detenu has not been found guilty by any competent Court or authority, for an offence mentioned in Section 2(j) of the Ordinance and therefore, he cannot be treated as a "Known Goonda" under Section 2(o) of the Ordinance No.30/2007 (hereinafter referred to as the Goonda Ordinance). For convenient reference, we think, it will be helpful to extract the relevant provisions of the above said Ordinance. Section 2(j) reads as follows :

> "Goonda means and includes a person who indulges in or promotes or abets illegal activities which are, directly or indirectly, prejudicial to the maintenance of public order and includes a bootlegger, a counterfeiter, a depredator of

environment, a digital data and copy right pirate, a drug offender, a Hawala racketeer, a hired ruffian, an immoral traffic offender, a loan shark or a property grabber".

The circumstances, under which a "Goonda" can be treated as a "Known Goonda" are given in Section 2(o), which reads as follows :

"Known Goonda means a goonda, who had been, for acts done within the previous seven years as calculated from the date of the order imposing any restriction or detention under this Ordinance:-

(i) found guilty, by a competent Court or authority, at least once for an offence within the meaning of the term 'goonda' as defined in clause (j) of Section 2; or

(ii) found in any investigation or enquiry by a competent police officer or other competent authority, on complaints initiated by persons other than police officers, in two

separate instances not forming part of the same transaction, committed any act within the meaning of the term 'goonda' as defined in clause (j) of Section 2."

A "Known Goonda" can be detained under Section 3(1) by the Government or an Officer, authorised by the Government under Sub-section (2) of Section 3. It is not in dispute that the District Magistrate, the second respondent herein is an authorised Officer under Section 3(2). Sub-sections (1) and (2) of Section 3 read as follows:

"Power to make orders, detaining Known Goondas and Known Rowdies-

(1) The Government or an Officer authorised under sub-section (2) may, if satisfied on information received from a Police Officer not below the rank of a Superintendent of Police with regard to the activities of any Known Goonda or Known Rowdy, that with a view to preventing such person

from indulging in any anti-social activity, within the State of Kerala in any manner, it is necessary so to do, make an order, directing that such person be detained.

(2) If having regard to the circumstances prevailing or likely to prevail in any area, the Government, if satisfied that it is necessary so to do, may, by order in writing, direct that during such period as may be specified in the said order, the District Magistrate having jurisdiction may exercise the powers under sub-section (1) in respect of persons residing within his jurisdiction or in respect of any person who has been acting or is about to act, against public safety, order and peace within such jurisdiction".

On being satisfied as contemplated under Sub-section (1) quoted above, a Known Goonda can be detained by the second respondent. It is the case of the respondents that the detenu is treated as a Known Goonda under the first

limb of Section 2(o). The petitioner submits that the detenu was never found guilty by any competent Court or authority, during the previous seven years from the date of Ext.P1. The allegation against him is that he has committed the offence under Section 4(IA) of the Mines & Minerals (Development & Regulation) Act, 1957. The said provision reads as follows :

> "No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder".

Going by Ext.P1, the 2nd respondent proceeded on the footing that the detenu has been found guilty by the SI of Police, Chelakkara, under Section 4(1A), read with Section 21(1) of the said Act and a fine of Rs.20,000/- has been imposed on him on 21.03.2005. Similarly, he has been found guilty by the SI of Police, Chelakkara and fined on 27.03.2006, 06.11.2006, 19.02.2007, 20.03.2007 and 04.05.2007. Again, he has been found guilty and ordered to pay fine by the SI

of Police, Cheruthuruthy on 05.01.2007 and 17.03.2007 under the aforementioned provisions of the above said Act. The learned counsel for the petitioner points out that the SI of Police is not competent to impose any fine for transporting river sand. In support of that submission, reliance is placed on Ext.P6 Judgment of the Division Bench of this Court. He also points out that only a competent Court can find a person guilty. The SI of Police is not a competent authority, who can hold that the detenu is guilty. Therefore, the jurisdictional preconditions for ordering detention are not present in this case. In other words, he cannot be treated as a “Known Goonda” and therefore, the detention order is bad. The learned Special Government Pleader, on the other hand, referred to Section 23A of the Mines & Minerals (Development & Regulation) Act, 1957, which authorises the compounding of offences by officers, who are authorised under Section 22 of the Act, to file complaints before the court concerning the commission of offences under the provisions of the Act. Section 22 of the above said Act reads as follows :

"**Cognizance of offences:** – No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government"

Section 23A, concerning compounding of offence reads as follows :

(1) Any offence punishable under this Act or any rule made thereunder may, either before or after the institution of the prosecution, be compounded by the person authorised under section 22 to make a complaint to the court with respect to that offence, on payment to that person, for credit to the Government of such sum as that person may specify:

Provided that in the case of an offence punishable with fine only, no such sum shall exceed the maximum amount of fine which may be imposed for that offence.

> 2) Where an offence is compounded under sub-section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded and the offender, if in custody, shall be released forthwith"

The learned counsel for the respondents made special reference to the notification issued under SRO 827/91, published in the Kerala gazette Extra Ordinary No.796 dated 26.06.1991. It is a notification issued under Section 22 of the above said Act, authorising various Officers to file complaints before the courts concerned, so that they can take cognizance as contemplated under Section 22 quoted above. Serial No.3 of the said notification refers to Police Officers of and above the rank of SI of Police in the State. They have been authorised to file complaints within their respective areas of jurisdiction. By virtue of that notification, the SI of Police can compound the offences under Section 23A. It is pointed out that in all these cases, the detenu pleaded

guilty before the police and the offences were compounded by imposing a penalty in accordance with law. Therefore, it should be treated that in all these cases, the detenu has been found guilty by the SI of Police, for the purpose of the first limb of Section 2(o), defining a “Known Goonda”. So, the detention order is valid, it is submitted.

7. We notice that the maximum penalty provided under the provisions of the above said Act for the offence under Section 4(1A) is imprisonment for a term, which may extend to two years or with fine, which may extend to Rs.25,000/- or both. So, going by Part II of the schedule to the Code of Criminal Procedure, which deals with offences, under other enactments other than IPC, the violation of Section 4(1A) of the Mines & Minerals (Development & Regulation) Act is a non-cognizable offence. The result is that the Police cannot register any crime based on the information lodged, conduct investigation and file report under Section 173 of the Cr.PC. If the offence is committed in the presence of the Police, the Officer concerned can file a complaint before the court concerned. If the offender agrees, the offence can

be compounded also. In this case, the case of the respondents is that the detenu pleaded guilty before the Police Officer and the Police Officer imposed a fine on him. The above pleading should be understood as a case of detenu agreeing to the compounding and the Police Officer concerned compounded the offences and imposed a penalty, which was below Rs.25,000/-. The point to be decided is whether such a compounding and imposition of penalty could be treated as a case of finding the detenu guilty, as contemplated under the first limb of Section 2(o). A person can be found guilty only by a competent court. The said finding will be followed by the imposition of a sentence. The SI of Police is not an authority competent to find a person guilty. In this case, the substantive law applicable is the provisions of the Mines & Minerals (Development & Regulation) Act, 1957 and the procedural law applicable is the Cr.PC, as no provisions are provided under the Mines & Minerals (Development & Regulation) Act,1957, concerning the trial of offenders. So, by virtue of Section 4(2) of the Code of Criminal Procedure 1973, the procedural law applicable to the trial of offences is the Cr.PC. No provision under the

Mines & Minerals (Development & Regulation) Act, 1957 or the Cr.PC has been brought to our notice, which makes the SI of Police, a “competent authority” to find a person guilty of an offence. The first limb of Section 2(o) will apply, if only a person is found guilty by a competent Court or by a competent authority, at least once for an offence, dealt with under the definition of “Goonda”. Though, the SI of Police concerned, is competent to compound the offences under Section 4(1A), he is not authorised to find the detenu guilty for the said offence. So, the compounding of the offences cannot be treated as equivalent to a finding of guilt by the competent Court or authority, for the purpose of Section 2(o). In the result, the petitioner's son, the detenu cannot be treated as a “Known-Goonda”, for the purpose of the provisions of the Goonda Ordinance (Ordinance No.30 of 2007) and therefore, his detention is void. It is declared so. The detenu shall be released forthwith.

As it is unnecessary, we are not dealing with the other contentions raised by the petitioner.

The Writ Petition is allowed as above.

K.BALAKRISHNAN NAIR,JUDGE

19.09.2007 **T.R.RAMACHANDRAN NAIR, JUDGE**

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